UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

In re:	)	Lead Case No. 1:03-cv-1000
	)	CLASS ACTION
UNUMPROVIDENT CORP. ERISA BENEFITS DENIAL ACTIONS	)	MDL Case No. 1:03-md-1552
	)	Judge Curtis L. Collier
CAROL J. TAYLOR, Plaintiff,	)	Case No. 1:03-cv-1009
	)	CLASS ACTION
v.	)	MDL Case No. 1:03-md-1552
UNUMPROVIDENT CORP., *et al.*, Defendants.	)	Judge Curtis L. Collier

M E M O R A N D U M

The Judicial Panel on Multidistrict Litigation has assigned to this Court a number of putative class action lawsuits against Defendant UnumProvident Corporation ("UnumProvident") and various of its directors, officers, and employees.[1] For purposes of efficient case management, the Court consolidated several of the cases and then grouped the cases into two broad categories by subject matter. The first such category is comprised of a number of putative class actions alleging improper denial of disability insurance benefits under the Employee Retirement Income Security Act of 1974 ("ERISA") and applicable state law (collectively, "Coordinated Benefits Actions"). The

[1]On January 3, 2003, the Judicial Panel on Multidistrict Litigation ordered certain cases against UnumProvident pending in districts other than the Eastern District of Tennessee be transferred to this district pursuant to 28 U.S.C. § 1407.

second category includes various putative securities fraud class action lawsuits brought on behalf of purchasers of UnumProvident securities, two consolidated putative class actions brought on behalf of UnumProvident employees participating in the company's 401(k) plan and alleging violations of various fiduciary duties under ERISA, and a consolidated shareholder derivative action asserting claims on behalf of UnumProvident against certain of its officers and directors ("Securities Related Actions").

This aspect of the case concerns the ERISA Benefits Denial Actions. Plaintiffs in these actions ("Plaintiffs") filed a Motion for Expedited Notice to Class Members of Pendency of Proposed Class Actions with the Court on December 9, 2004, and requested an expedited hearing on the motion (Case No. 1:03-cv-1000, Court File Nos. 95, 97, 99; Case No. 1:03-cv-1009, Court File Nos. 62, 64, 66). Because Defendants responded they intend to notify certain of their insureds (and putative class members in these actions) of their settlement with state insurance regulatory authorities and the United States Department of Labor as soon as January 4, 2005, the Court held a hearing regarding Plaintiffs' requested notice on December 28, 2004. Present representing Plaintiffs were Robert Harwood, Matthew Houston, and Susanne Scovern, and present for the Defendants were John Konvalinka, William Kayatta, Chris Collins and Barbara Furey[2].

At the conclusion of that hearing, after considering the parties' filings regarding the motion and hearing oral arguments by counsel for Plaintiffs and Defendants, the Court announced its decision from the bench that it **DENIED** Plaintiffs' motion. This memorandum will articulate the

[2]The Court notified the United States Department of Labor (DOL) of the Plaintiffs' motion and the scheduled hearing on the motion and invited DOL to respond to the motion and to participate in the hearing. By email make a part of the record of the hearing, DOL indicated it would not participate in the hearing but made its position known.

reasons for the Court's decision.

I. STANDARD OF REVIEW

The burden is on the moving party to show both that the Court has the authority to take the action it seeks, and that such action is warranted by the facts.

II. RELEVANT FACTS

In September 2003, Maine, Massachusetts, and Tennessee ("Lead States") commenced a multi-state market conduct examination into the long-term disability income claims handling practices of UnumProvident, Unum Life Insurance Company of America, The Paul Revere Life Insurance Company, and Provident Life and Accident Company ("Defendants"). The other 47 states, the District of Columbia, and American Samoa ("participating jurisdictions") joined the examination. The Office of the New York Attorney General ("NYAG") in September 2003 announced it would be conducting a similar investigation. The United States Department of Labor ("DOL") in March 2004 began its own investigation into UnumProvident subsidiaries under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*., relating to its ERISA benefit plans.

The Lead States' and DOL investigations recently were settled, with the Lead States, the DOL, and the companies entering into a Regulatory Settlement Agreement (hereinafter "RSA", see Case No. 1:03-cv-1000, Court File No. 89, Exhibit 1; Case No. 1:03-cv-1009, Court File No. 57, Exhibit 1). The NYAG was not a party to the RSA but has announced it supports it and is closing its investigation. The RSA requires approval by no less than two-thirds of the participating

jurisdictions for it to go into effect, and as of December 22, 2004 the RSA had been approved by 40 states and the District of Columbia (Case No. 1:03-cv-1000, Court File No. 106; Case No. 1:03-cv-1009, Court File No. 72). Because more than the required two-thirds of participating jurisdictions approved the RSA, it is now in effect.

The RSA provides for reassessment of certain denials of claims or terminations of benefits (RSA at 9-12). Claimants whose claims were denied or benefits terminated on or after January 1, 2000 and prior to the Implementation Date (which the RSA defines as thirty days after approval by two-thirds of the participating jurisdictions, or January 20, 2005) may have their claims reassessed and will receive notice of the reassessment process. Other claimants, whose claims were denied or benefits terminated between January 1, 1997 and January 1, 2000 may request to have their claims reassessed, but will not receive notice of the RSA reassessment scheme. Defendants informed the Court they intend to mail out these notices on a rolling basis beginning January 4, 2005 in order to meet the deadlines for notice to claimants set out in the RSA (Case No. 1:03-cv-1000, Court File No. 105; Case No. 1:03-cv-1009, Court File No. 71).

The RSA provides if a claimant participates in the reassessment process, Defendants may require that claimant to agree "if (and only if) the reassessment results in a reversal or other change in the prior decision denying or terminating benefits, then such claimant shall not pursue any legal action to the extent (and only to the extent) such action is based on any aspect of the prior denial or termination that is reversed or changed" (RSA at 14). The RSA also provides for tolling of the applicable statutes of limitation during the pendency of the claimant's reassessment process (*Id*.). The notice letter Defendants propose to send out to claimants includes this language and advises claimants about the waiver issue in detail (*See* Case No. 1:03-cv-1000, Court File No. 99, Exhibit

A; Case No. 1:03-cv-1009, Court File No. 66, Exhibit A).

III. DISCUSSION

Plaintiffs in their motion request an Order providing for expedited notice of the pendency of the *Benefits Denial* and *Taylor* proposed class actions to putative class members. Plaintiffs ask the Court to order Defendants either to insert language drafted by Plaintiffs in the RSA notice Defendants send to putative class members or to enclose a separate letter drafted by Plaintiffs with the RSA notice.[3] Plaintiffs assert the Court has the authority to order such notice under Rule 23(d), which governs class actions:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, **for the protection of the members of the class or otherwise for the fair conduct of the action**, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action. . .

Fed. R. Civ. P. 23(d) (emphasis added). While the Court agrees it has the authority to order notice to putative class members prior to certification of the class in some situations, the Court does not believe such notice is appropriate here. Because the Court finds Plaintiffs have not shown such notice is necessary "for the protection of the members of the class or otherwise for the fair conduct of the action," the Court finds Plaintiffs have not shown the notice Plaintiffs request is appropriate under Rule 23, and thus the Court will refrain from ordering such notice.

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[3] Plaintiffs' proposed language for insertion into Defendants' notice letter is found in Case No. 1:03-cv-1000, Court File No. 99, Exhibit D; Case No. 1:03-cv-1009, Court File No. 66, Exhibit D. Plaintiffs' proposed letter for enclosure with Defendants' notice letter is found in Case No. 1:03-cv-1000, Court File No. 99, Exhibit E; Case No. 1:03-cv-1009, Court File No. 66, Exhibit E.

A. Concurrent Notice of Pending Class Action and RSA Reassessment to Prevent Abuse by Defendants

Plaintiffs in their brief first argue Rule 23 authorizes the notice they request to prevent abuse that might occur from Defendants' notice of the RSA reassessment process to putative class members. Plaintiffs characterize Defendants' proposed notice as "misleading," arguing because it informs claimants of the RSA reassessment process, but not the alternative sought in the proposed class action, it only tells part of the story. In addition, Plaintiffs argue fundamental fairness and equity require this notice to prevent prejudice to potential class members who may make a decision to participate in the RSA without being completely informed about their options. Defendants respond by asserting the cases allowing corrective notice to a proposed class before it is certified revolve around a court's finding of abuse, coercion, or fraud, none of which is present here, and thus corrective notice is not warranted.

Courts have ordered corrective notice under Rule 23 "for the protection of the members of the class or otherwise for the fair conduct of the action" where a party has made or intends to make abusive, coercive, or misleading statements to putative class members, but courts have refrained from ordering a corrective notice under Rule 23 when these elements were absent. *See, e.g., Great Rivers Coop. of Southeastern Iowa v. Farmland Indus., Inc*., 59 F.3d 764, 766 (8th Cir. 1995) (overturning district court's order requiring defendant to publish plaintiffs' opinion piece in defendant's newsletter to putative class members and refrain from expressing its opinion the suit was meritless, because the record did not show clear findings of misrepresentation and the likelihood of serious abuses by defendant to support such an order, even though defendant's statements were "somewhat misleading"); *School Asbestos Litigation v. Lake Asbestos of Quebec, Ltd, et. al.*, 842 F.2d 671 (3d Cir. 1987) (finding appropriate an affirmative disclosure requirement to notify class

members of defendants' sponsorship of a trade group sending out informational pamphlets regarding the merits of the lawsuit, implicitly urging nonparticipation in the suit but not revealing its self-interestedness, on all communications between the trade group and class members); *Georgine v. Amchem Products, Inc.*, 160 F.R.D. 478, 498 (E.D. Pa.1995) (ordering corrective notice where some plaintiffs' counsel contacted class members seeking opt-outs from the class and a settlement of the class action with which they disagreed, and made "numerous inaccurate statements and misleading omissions related to key points of the settlement agreement"); *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994) (finding corrective notice was not appropriate, although potential for coercion existed, where defendant contacted putative class members urging them to opt out of the proposed class action, because the record contained little evidence of actual harm, the class had yet to be certified, and a corrective notice was potentially confusing to putative class members); *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981) (ordering corrective notice where defendant contacted class members and disclosed discouraging information about the class action the court had not allowed it to include in the official class notice).

Because the United States Court of Appeals for the Sixth Circuit has not spoken on this precise issue, the Court will follow these courts' guidance. Plaintiffs have not shown any abuse, coercion, or affirmative misrepresentations by Defendants in their proposed notice of the RSA reassessment process. The notice letter Defendants intend to send to putative class members expressly explains the claims a claimant waives by participating in the RSA reassessment (*See* Case No. 1:03-cv-1000, Court File No. 99, Exhibit A; Case No. 1:03-cv-1009, Court File No. 66, Exhibit A). While, as Plaintiffs argue, this may be confusing to some unsophisticated putative class members, the Court believes any waiver notice has the potential to be confusing to unsophisticated

claimants. Defendants' proposed notice explains this waiver in detail, which lessens the likelihood for confusion (*See Id.*). In addition, Defendants' notice instructs a claimant who has commenced legal action against Defendants regarding a prior claim decision to contact her attorney, and advises her about the effect of the waiver on such an action (*See Id.*). Accordingly, since Plaintiffs have not shown Defendants' conduct is the type that would necessitate a corrective notice to remedy confusion or misstatements, the Court does not believe such a corrective notice fits within Rule 23's authorization for the Court to order such notices as are necessary "for the protection of the members of the class or otherwise for the fair conduct of the action." Fed. R. Civ. P. 23(d).

B. Notice of Action Contemporaneously with Request for Waiver of Rights to Participate in Action

Plaintiffs also argue putative class members should receive notice of the relief their proposed class action seeks (independent re-review of claims, rather than the internal re-review by Defendants' employees afforded by the RSA) at the same time they receive notice of Defendants' RSA reassessment process and request for waiver of rights to that relief, to avoid forcing them to make an uninformed decision about whether to participate in the RSA reassessment. Plaintiffs interpret the RSA waiver provision as requiring any claimant who participates in the RSA reassessment who receives "any monetary relief, even a dollar more" than Defendants originally granted, to be bound to the outcome of the RSA reassessment process, denying access to subsequent judicial review (*See* Case No. 1:03-cv-1000, Court File No. 97 at 3; Case No. 1:03-cv-1009, Court File No. 64 at 3). Thus, they contend, claimants should be informed about the claims involved in the proposed class action before being asked to waive the right to bring those claims by taking part in the RSA reassessment process.

Defendants claim Plaintiffs have misinterpreted the RSA waiver provision. Defendants

argue this provision requires a claimant taking part in the RSA reassessment to waive his rights to sue Defendants only as to "a reversal or other change in the prior decision denying or terminating benefits" (*i.e.*, a full or partial grant of benefits where benefits had previously been denied or terminated) in the reassessment of her claim (*See* Case No. 1:03-cv-1000, Court File No. 105 at 5; Case No. 1:03-cv-1009, Court File No. 71 at 5, quoting the RSA at 14). Thus, if a claimant receives a grant of full benefits after the RSA reassessment, Defendants concede he has waived all of his rights to sue Defendants regarding their original denial of his claim, but since he has received his benefits, he has been granted the full relief any lawsuit would seek. If, however, a claimant undergoes the RSA reassessment and part or all of his claim for benefits is again denied, he retains his right to sue Defendants as to the portion of his claim that is denied. Thus, Defendants argued during the hearing a putative class member waives virtually nothing by participating in the RSA reassessment.[4] Defendants further argued a claimant would be irrational not to participate in what Defendants characterized as a guaranteed "free shot" at reassessment in favor of hoping for the uncertain relief requested in the proposed class action, in which the class has not yet been certified.

The Court agrees with Defendants' characterization of the waiver provision, and finds the waiver required in the RSA reassessment process is insignificant to the claims involved in the proposed class action. Indeed, the proposed class action will continue to proceed while the RSA reassessment process takes place, and because the RSA allows for tolling of the relevant statutes of limitation for any claimant taking part in the RSA reassessment (RSA at 14), a claimant whose claim is fully or partially denied during the RSA reassessment may join the proposed class action after her

[4]Defendants additionally agreed with the Court during the hearing they will be estopped from later arguing this waiver provision bars claimants from suing Defendants over any full or partial denial of claims Defendants may make during the RSA reassessment process.

RSA reassessment is complete and sue over the parts of her claim that were not remain denied after the RSA reassessment. Therefore, the Court finds the waiver requested by participation in the RSA reassessment does not require notice of the proposed class action contemporaneously with the waiver request, as has been required by other courts where a defendant sought a significant waiver of claims involved in the class action. *See, e.g., Jenifer v. Delaware Solid Waste Auth.*, 1999 WL 117762 (D. Del. 1999) (defendant ordered to include notice of pending class action in communications seeking settlement of claims involved in the action); *Ralph Oldsmobile, Inc. v. General Motors Corp.*, 2001 WL 1035132 (S.D.N.Y. 2001) (defendant ordered to include notice of pending class action in communications seeking settlement of claims involved in the action).

Because Plaintiffs could not provide the Court with an example of a rational claimant who would forego the RSA reassessment process in favor of the uncertain re-review relief of the proposed class action, the Court finds notice of the proposed class actions would not aid a rational claimant in deciding whether to participate in the RSA reassessment. Thus, the requested notice will not provide for the "protection of the members of the class or otherwise for the fair conduct of the action." Fed. R. Civ. P. 23(d). In fact, the Court finds notice of this action would merely confuse claimants and discourage them from participating in the RSA reassessment without giving them good reasons not to do so. Because Plaintiffs did not show the notice they request falls into either of the two categories listed in Rule 23, the Court finds such notice is not appropriate under that rule.

IV. CONCLUSION

For the aforementioned reasons, and in accordance with the ruling announced at the hearing

on December 28, 2004, the Court will **DENY** Plaintiffs' motion (Case No. 1:03-cv-1000, Court File No. 99; Case No. 1:03-cv-1009, Court File No. 66).

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE